NG KIM VOOY (BERNIAGA SEBAGAI ZAMAN ENTERPRISE)

v.

GAYAH BINTI ISMAIL & ANOR.
(KEDUA-DUANYA BERNIAGA SEBAGAI KILANG PERKAYUAN HAJI MOHD. NOOR)

HIGH COURT MALAYA, KUALA TERENGGANU
DATUK MOHD. SAARI B. YUSOFF J.
[CIVIL SUIT NO. 22-49-94]
22 NOVEMBER 1994

INJUNCTION: *Application to prevent defendants from entering forest compartment 549 for logging purposes - Plaintiff claiming right to manage logging activities pursuant to appointment by defendants as evidenced by letter - Appointment later revoked - Whether promise could be specifically enforced - Whether there was a serious question to be tried - Balance of convenience.*

CONTRACT: *Defendants appointing plaintiff to manage logging activities in forest compartment 549 - Appointment later revoked - Plaintiff seeking order for specific performance and an injunction to prevent defendants from carrying out logging activities in forest compartment 549 - Whether a contract for service can be specifically enforced.*

The plaintiff was appointed by the defendants to manage the logging activities in forest compartment 549 (the said compartment) by letter dated 19 October 1993 (the said letter). The said letter was issued after the State Government had approved a timber concession in respect of the said compartment in favour of the defendants' firm in which the original proprietor, Haji Mohd Noor and the two defendants were partners. By letter dated 6 July 1994, the approval was revoked as Haji Mohd Noor was an undischarged bankrupt but by the same letter the State Government granted the timber concession to the defendants who by then wholly owned the firm. Subsequently, the defendants revoked the plaintiff's appointment and the plaintiff filed a writ seeking an order for specific performance of the contract.

Pending the hearing of the writ the plaintiff applied for an injunction to prevent the defendants from entering the said compartment to carry out logging activities.

The issue before the Court was whether the promise as evidenced by the said letter could be specificaly enforced.

Held:

[1] The promise by the firm, as stated in the said letter, as a contract for service could not be specifically enforced. Hence, on this ground alone the application to injunct the defendants from entering forest compartment 549 must fail as there was no serious issue to be tried.

[2] The licence granted to the defendants to log in forest compartment 549 was valid up to 31 July 1995, meaning if the injunction was to apply to the said compartment, by the time the main suit came up for hearing the licence would have expired. Further, pending the outcome of the suit the defendants' sawmill would be inoperational resulting in the workers being laid off. Hence, on the facts the balance of convenience lay in favour of the defendants.

[Application dismissed with costs]

Case referred to:
Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, West Malaysia [1988]1 MLJ 302 ***(foll)***

Legislation referred to:
Partnership Act 1961, s. 7
Specific Relief Act 1950, s. 20(1)(b)
Specific Relief Act 1950, s. 54(f)

Other sources referred to:
Law of Contract, **Cheshire and Fifoot's** 6th edn p. 533

For the plaintiff - Mazlan b. Ahmad; M/s. Asmadi, Azmi & Associates
For the 1st & 2nd defendants - Teo Poh Oon (Mrs. Chew with him); M/s. Teo & Chew

JUDGMENT

Mohd. Saari bin. Yusoff J:
In the writ filed against the defendants, the plaintiff is seeking for an order that he be appointed to manage logging activities in forest compartment 549.

In affidavit evidence of the plaintiff, it was deposed that the plaintiff's relationship with Kilang Perkayuan Haji Mohd. Noor (hereinafter referred to as "the firm") was first initiated with the plaintiff being appointed as a contractor to log in forest compartment 412. No dispute arises in respect of the said forest compartment.

Speaking of the structure of the firm, originally one Haji Mohd. Noor was the sole proprietor of the firm. As from 28 April 1993 both defendants became partners of the firm, as evidenced by registration certificate (NKV-11).

On 19 October 1993, after the two defendants became partners, the firm appointed the plaintiff to manage logging activities in forest compartment 549 as evidenced by a letter dated 19 October 1993 (NKV-6) which reads as follows:-

> Ke Majlis,
> Tuan Pegawai,
> Hutan Daerah,
> Terengganu Barat,
> Pejabat Kuala Berang.
>
> Tuan,
>
> Per: Memohon Mendapat Kelulusan Keluaran Lesen Pembalak Di Atas Surat Kelulusan Bertarikh 18 Oktober 1993. Bil: (56) dlm. P.H.N.T 400/7/1/419.
>
> Berkaitan dengan perkara di atas, says bagi pihak Syarikat Kilang Perkayuan Haji Mohd. Noor, melantik dan memberi kuasa kepada En. Ng Kim Vooy K/P No: 7813660 bagi mengurus kawasan membalak dan juga jabatan-jabatan kerajaan yang ada kaitan dengan pembalakan di kawasan ini. Kompatmen No. 549 di Daerah Hutan Simpan Tambat, Mukim Hulu Terengganu.
>
> Sekian, Pengakuan Saya.
>
> Terima Kasih.
>
> Yang benar,
> Kilang Perkayuan Haji Mohd Noor
>
> t.t. xxx
> Pengurus
> Hj. Mohd. Nor Bin Abdullah AMN PPN PJK

The said letter was later revoked by the firm (GI-3).

With regard to the said letter (NKV-6), it was issued after the State Government approved timber concession in respect of forest compartment 549 to the firm *vide* letter dated 18 October 1993 (NKV-5), in which firm Haji Mohd. Noor and the two defendants were partners.

It is common ground that on 6 July 1994, by letter (GI-2), the State Government revoked the approval in respect of forest compartment 549 given to the firm with Haji Mohd. Noor as one of the partners. In the same letter the State Government approved timber concession in respect of the same forest compartment to the firm then wholly owned by the two defendants. At this point of time Haji Mohd. Noor was an undischarged bankrupt.

With regard to the promise by the firm in appointing the plaintiff to manage logging activities in forest compartment 549, it appears that if such promise could be specifically enforced, by virtue of s. 7 of the Partnership Act 1961, such promise is binding on the two defendants on the premise that both defendants were partners at the time of the firm issuing the letter (NKV-6). However, this point was not argued by the parties.

More importantly, the issue which arises is whether the promise as evidenced by the letter (NKV-6) could be specifically enforced.

Law

In *Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, West Malaysia* [1988]1 MLJ 302 the Supreme Court *inter alia* held that a contract for service or service contract would not be specifically enforced by the High Court (s. 20(1)(b) of the Specific Relief Act 1950) and that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced (s. 54(f) of the same Act).

Cheshire and Fifoot's Law of Contract 6th Edition page 533 states as follows:

> The Court will not enforce the obligation of the defendant by a decree of specific performance unless it can also enforce the obligation of the plaintiff. It must be possible to give full relief to both parties or, as Lord Lyndhurst put it: "The Court will not decree an agreement to be specifically performed unless it can execute the whole of the agreement." Thus, if the defendant agrees to form a company for the purpose of working the plaintiff's patent, and the plaintiff agrees that he will devote the whole of his time to the interests of the company, there can be no specific performance at the instance of the plaintiff for, as we shall see, he himself cannot be compelled to render personal services to another (*Stocker v Wedderburn* [1857], 3 K&J 393).

Applying the foregoing authorities to the facts of this case, in my judgment the promise by the firm as stated in the letter (NKV-6) could not be specifically enforced. Hence,on this ground alone the application to injunct the defendants from entering forest compartment 549 must fail as there is no serious issue to be tried.

Next issue is on the balance of convenience. On my reading the license (NKV-9) given to the defendants to log in forest compartment 549, it is valid up to 31 July 1995, meaning if the injunction were to apply to the said forest compartment, by the time the main suit came up for hearing the licence would have expired. Further, pending the outcome of the suit, the defendants' sawmill which is ongoing would be inoperational, resulting in the workers of the sawmill being laid off. Hence on the facts, my view is that the balance of convenience would favour the two defendants.

It is noted that the plaintiff had spent a substantial sum of money in buying necessary equipment for purposes of logging in forest compartment 549. It is a business venture and like all business ventures, it is open to financial risk. In the instant case, if the plaintiff were to succeed in proving the purported breach against the defendants. I am of the opinion that the plaintiff would be adequately compensated by an award of damages.

In view of the foregoing, I dismiss the application (Enclosure 4) with costs.